IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JOSE VICENTE MONTANO VEGA,
Petitioner.

No. 2 CA-CR 2014-0371-PR
Filed December 5, 2014

Petition for Review from the Superior Court in Maricopa County
No. CR2009113985001DT
The Honorable Jeanne Garcia, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Gerald R. Grant, Deputy County Attorney, Phoenix
Counsel for Respondent

Jose V. Montano Vega, Florence
In Propria Persona

MEMORANDUM DECISION

Presiding Judge Miller authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Espinosa concurred.

M I L L E R, Presiding Judge:

¶1 Petitioner Jose Vega seeks review of the trial court's order summarily denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *State v. Swoopes,* 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no such abuse here.

¶2 After a jury trial, Vega was convicted of sexual abuse and two counts each of sexual conduct with a minor and child molestation. The trial court sentenced Vega to twenty-two years in prison, to be followed by two consecutive life sentences. We affirmed Vega's convictions and sentences on appeal. *State v. Vega,* 228 Ariz. 24, 262 P.3d 628 (App. 2011). Vega initiated a Rule 32 proceeding in 2012, and after appointed counsel notified the court he was "unable to find any claims for relief to raise in post-conviction proceedings," Vega filed a supplemental pro se petition in 2013.

¶3 In its ruling denying that petition, the trial court summarized the procedural history of the case and correctly concluded Vega's "claim regarding the admission of the uncharged sexual act [was] precluded under Rule 32.2(a)(2) because he already sought and obtained a ruling from the Court of Appeals on this issue." *See Vega,* 228 Ariz. 24, ¶¶ 11-25, 262 P.3d at 631-34 (erroneously admitted evidence of uncharged offense against victim harmless error). The trial court also precluded Vega's claim that the jury should have determined whether the acts were "masturbatory or penetration" and "preparatory or completed" for sentencing purposes, concluding he could have but did not raise this claim on appeal, *see* Ariz. R. Crim. P. 32.2(a)(3), and found it had no merit in

any event. The court further concluded Rule 32.1(f) and (g) did not apply and Vega had not supported a claim of ineffective assistance of counsel.[1]

¶4 On review, Vega maintains the trial court improperly precluded his claim regarding the admission of the uncharged sexual act, noting that "in the appellate decision, [the court] did not rule upon the U.S. or Arizona Constitutional issue." But the "constitutional" aspect of the claim could have been raised on appeal, and is therefore likewise precluded. The court did not err in so concluding. *See* Ariz. R. Crim. P. 32.2(a)(2), (3). Alternatively, to the extent Vega suggests the constitutional claim was raised but we did not address it on appeal, and to the extent he attempts to thereby challenge our ruling on appeal, he may not do so in a post-conviction proceeding. *Cf.* Ariz. R. Crim. P. 31.19(a) (party seeking review of court of appeals decision may file petition for review with supreme court).[2] We similarly reject Vega's argument that the court incorrectly precluded his claim regarding the application of the sentencing statute. Because Vega could have, but did not, challenge his sentences on appeal, he is precluded from doing so now, as the court correctly ruled. *See* Ariz. R. Crim. P. 32.2(a)(3).

¶5 Additionally, Vega relies on a mistaken interpretation of Rule 32.2(a) to argue that preclusion does not apply to him because he did not expressly waive his claims. He asserts, "[a]s written [Rule 32.2(a)] means only a knowing and intelligent waiver [is] required whenever constitutional rights are at issue." However, the clear language of Rule 32.2(a) simply does not support Vega's

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[1]Although Vega obliquely mentions ineffective assistance of counsel in his reply to the petition for review, he did not meaningfully raise the trial court's denial of this claim in his petition and we thus do not address it. We further note, to the extent Vega suggests he is entitled to different relief because this Rule 32 proceeding is "of[-]right," we note it is not. *See* Ariz. R. Crim. P. 32.1 (defining of-right Rule 32 proceeding).

[2]On April 24, 2012, the Supreme Court of Arizona denied Vega's petition for review from our ruling on appeal.

interpretation of that rule. Nor are Vega's claims of sufficient constitutional magnitude that they may not be waived implicitly and subjected to preclusion under Rule 32.2(a), as Vega seems to suggest.

¶6 "[P]reclusion does not apply to claims involving certain constitutional rights unless the record shows that the defendant knowingly, voluntarily, and intelligently waived the right." *State v. Espinosa,* 200 Ariz. 503, ¶ 7, 29 P.3d 278, 280 (App. 2001). "If an asserted claim is of sufficient constitutional magnitude, the state must show that the defendant 'knowingly, voluntarily and intelligently' waived the claim." Ariz. R. Crim. P. 32.2(a)(3) cmt. To avoid preclusion, Vega must show not only that "a constitutional right is implicated," but that it is "one that can only be waived by a defendant personally," such as the right to a twelve-person jury, the right to jury trial, or the right to counsel. *Swoopes,* 216 Ariz. 390, ¶ 28, 166 P.3d at 954. Vega provides no argument suggesting that his claims, to wit, the right to challenge anew the admission of the uncharged sexual act and that the sentencing statute, as applied to him, denied him the right to a jury trial, were of such magnitude that a knowing waiver was required.

¶7 Finally, Vega argues the trial court improperly rejected his claim that *State v. Ferrero*, 229 Ariz. 239, 274 P.3d 509 (2012), is a significant change in the law that would have changed the court's ruling regarding the admission of the uncharged sexual act. *See* Ariz. R. Crim. P. 32.1(g); *see also* Ariz. R. Crim. P. 32.2(b) (excepting from preclusion claims raised under Rule 32.1(d), (e), (f), (g), and (h)). However, Vega raises this claim without explaining why *Ferrero* constitutes a significant change in the law that applies to his case or why the court erred by finding his claim precluded in the first instance. Notably, he also asserts *Ferrero* "embrac[ed] the legal reasoning" of an older case, *State v. Garcia,* 200 Ariz. 471, 28 P.3d 327 (App. 2001), which we relied upon in our ruling on appeal, impliedly suggesting *Ferrero* is not a significant change in the law. *See Vega,* 228 Ariz. 24, ¶ 11, 262 P.3d at 631. And, at least as to the appropriate test for intrinsic evidence, our supreme court expressly intended its ruling in *Ferrero* to apply "[h]enceforth." *Ferrero,* 229 Ariz. 239, ¶ 20, 274 P.3d at 243. For all of these reasons, we conclude

the court properly rejected Vega's claim based on a significant change in the law.

¶8 Therefore, we grant the petition for review, but deny relief.